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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

HEATHER NICOLE BOOZE,

Defendant and Appellant.

C058204

(Super. Ct. No. 62068235)

Granted three years of probation after a plea of no contest to one count of issuing insufficient-funds checks (Pen. Code, § 476a, subd. (a); undesignated statutory references are to the Penal Code) and ordered inter alia to pay a probation supervision fee of \$720.00 (§ 1203.1b), defendant Heather Nicole Booze contends that the matter must be remanded for the trial court to conduct a hearing on her ability to pay the fee or to obtain a knowing and intelligent waiver of such hearing. We agree and shall remand the matter.

FACTUAL AND PROCEDURAL BACKGROUND

The factual basis for defendant's plea, as stated by the prosecutor, is as follows: "On or about August 9, 2006, in Placer County, the defendant did deliver a check to the Brockway Hair Salon in the amount of \$158.68 for which there were insufficient funds in her account to cover the amount of that check, and the defendant was aware of that circumstance."

Originally charged with nine counts of violating section 476a, subdivision (a), all involving the same victim, defendant unsuccessfully sought diversion by offering to make restitution to the Placer County District Attorney's Bad Check Restitution Program. Thereafter, defendant agreed to plead no contest to count 1 in return for dismissal of counts 2 through 9 with a *Harvey* waiver for purposes of restitution only. (Cf. *People v. Harvey* (1979) 25 Cal.3d 754.) She also agreed to waive referral to probation.

The plea agreement form, which defendant signed on the date of sentencing, advised her that she could be required to pay a fine of up to \$50,000 plus penalty assessments, a restitution fine of \$200 to \$10,000, and victim restitution. It further advised her that she would be required to obey all terms and conditions of probation. However, it did not mention a probation supervision fee.

At sentencing, the trial court took defendant's plea, including her waiver of referral to probation and formal

arraignment. On the prosecutor's representation, the court noted that victim restitution amounted to \$1,914.31 but that payment in full had already been submitted. Defendant said she had reviewed with counsel what the court called "the recommended orders granting probation" (a document which is not in the record), understood them, and accepted them. The court then granted formal probation for three years, including 90 days to be served in the county jail; because defendant was in an advanced state of pregnancy, the start of her jail time was postponed to a date over two months after her expected delivery date. Finally, the court advised that she needed to make arrangements "to pay the fine." The court never mentioned a probation supervision fee.

The trial court's written "order granting probation and judgment for monetary penalties" included victim restitution in the amount of \$1,914.31, fines totaling \$270.00, and other costs, including a probation supervision fee in the amount of \$720.00.

DISCUSSION

Probation supervision fees are imposed pursuant to section 1203.1b, which provides in part:

"(a) In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is

granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision. . . . The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.

"(b) When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made."

In this case, the record does not show that section 1203.1b was complied with.

Because defendant waived referral to probation, she did not receive notice of a possible probation supervision fee through a probation report. The plea agreement form did not mention such a fee. Neither did the trial court at sentencing.

Thus, the record does not show how the probation officer calculated the amount of the fee, or how or whether the probation officer determined that defendant could pay it. It also fails to show that anyone advised defendant she was entitled to a hearing on her ability to pay unless she knowingly and intelligently waived her right to a hearing. Finally, she did not receive such a hearing or knowingly and intelligently waive her right to such hearing on the record.

Because the trial court did not comply with section 1203.1b, we must remand the matter for further proceedings in accordance with the statute. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067-1068.)

The People assert that defendant received notice of the probation supervision fee because she acknowledged reviewing with counsel the "recommended orders granting probation." But those "recommended orders" are not in the record, and the trial court's dialogue about them with defendant did not include any reference to a probation supervision fee. Thus, we have no way

of knowing whether the fee was mentioned in the recommended orders, and we decline to speculate on the point.¹

Relying on *People v. Valtakis* (2003) 105 Cal.App.4th 1066 (*Valtakis*), the People also assert that defendant waived the issue by failing to object to the fee below. Their reliance is misplaced. In *Valtakis*, the probation report told the defendant that he might have to pay a probation supervision fee in the amount of \$250.00. (*Id.* at p. 1069.) Here, nothing in the record shows that defendant received notice of the fee or its amount.

For all the above reasons, we shall remand the matter to the trial court for further proceedings in accordance with section 1203.1b.

DISPOSITION

The portion of the order granting probation that requires defendant to pay the costs of probation pursuant to Penal Code section 1203.1b is vacated. The matter is remanded to the trial court for the redetermination of probation-related costs. If the court determines that defendant should pay those costs, the court shall make a separate order to that effect rather than

¹ During the sentencing hearing, as we have mentioned, the prosecutor pointed out that the victim restitution amount had not yet been filled in on a form the trial court and the parties were consulting. If this form was the "recommended orders," then it might also have omitted other information, such as the probation supervision fee.

impose the costs as a condition of probation. (*O'Connell*,
supra, 107 Cal.App.4th at p. 1068.) The order placing defendant
on probation is otherwise affirmed.

SIMS, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.